

THE DEVELOPMENT OF ENVIRONMENTAL CRIME AND SACTION IN MALAYSIA

Maizatun Mustafa, PhD, Assoc. Prof.
Nurah Sabahiah Mohamed, PhD, Asst. Prof.

Ahmad Ibrahim Kulliyyah of Laws,
International Islamic University Malaysia

Abstract

Environment and its resources are precious to human being and must be protected. Therefore, the continued degradation of the environment that happens mainly as a result of human activities ought to be subjected to regulatory control, and individuals or companies who willfully damage the environment ought to be punished. In Malaysia and elsewhere, environmental crimes continue to increase and extend to diverse areas including pollution, waste disposal, threats to flora, fauna and biodiversity, and illegal logging. Over the years, Malaysia's changing perceptions about environmental vulnerability has altered the view on environmental crime. At present various strategies have been introduced to deal with different types of environmental offences, with laws that target not only individual offenders, but also make provision for corporate liability. This paper discusses in general the scope of environmental crimes in Malaysia, examines shifts in the regulation of environmental crime over the years since the passage of the Environmental Quality Act in 1974, and identifies the development of innovative strategies within the law in dealing with these crimes. The purpose of this paper is to document changes within the law on environmental crime that have shaped criminal law and environmental protection in Malaysia.

Keywords: Environmental crime, environmental law, criminal sanction

Introduction

Environmental crime can be considered as a perpetration of harms against the environment and human health that violate the law. Thus, it differs considerably from the traditional criminal model that focuses on crimes against persons and private property. For this and other reasons, environmental crime would take longer to be accepted as a genuine category of crime as compared with other crimes. In recent years attempts have been

made to provide meaning and scope of environmental crime. Generally, environmental crime covers acts that breach environmental legislation and cause significant harm or risk to the environment and human health. There is no internationally agreed definition for environmental crime but it is globally recognised that it poses a threat to ecosystems, health and national security. Clifford (1998) in her book proposed two definitions of environmental crime, namely first, as “an act committed with intent to harm or with a potential to cause harm to ecological and/or biological systems and for securing business or personal advantage”. Second, as “an act that violates an environmental protection statute”. The most known areas of environmental crime are the illegal emission or discharge of substances into air, water or soil, the illegal trade in wildlife, illegal trade in ozone-depleting substances and the illegal shipment or dumping of waste. These type of crimes cause significant damage to the environment while at the same time have relatively low risks of detection. Previously, environmental considerations have generally attracted lesser attention than traditional forms of crime and violence. What more, environmental crime does not conform to the traditional type of criminal offences due to the nature of its crime. There are various factors that must be considered in an environmental offence, such as what are the harm done, whether the action caused immediate harm or was only potentially harmful; and who is the offender. In addition, the question of how enforcement agencies enforce the protection of the environment is a complex one. There are some basic principles in criminal law for the purpose of prosecution that may not fit well into environmental crime prosecution such as the existence of intention or *mens rea*. Defining the scope of environmental crime can also be confusing. For example, when a pollutant is released into a segment of the environment, the effect of such harm might be immediate, but the storing of hazardous chemical in a factory is only potentially harmful to the environment (Mustafa and Ariffin, 2014). Scientific uncertainties make it more difficult to prove whether an action is harmful or potentially harmful. There are also possible issues with regard to prosecution and penalties when the offence is committed by companies or company officers, and not by an individual person. Over the years, changing perceptions about environmental vulnerability, and the consequences of environmental crimes on the quality of the environment have helped altered the view on environmental crime. At present various strategies have been introduced to deal with different types of environmental offences, with laws that target not only individual offenders, but also make provision for corporate liability. This paper discusses in general the concept of environmental crimes in Malaysia, and its development within environmental law, particularly since the passage of the Environmental Quality Act in 1974. The purpose of this paper is to document changes within

the law on environmental crime that have shaped criminal law and environmental protection in Malaysia.

Historical Emergence of Environmental Law

Malaysia has a number of legislations that are relevant to environmental protection, but the most significant one is the Environmental Quality Act which was enacted in 1974 (Mustafa, 2009). One of the main objectives of this Act is to regulate pollution and other types of environmental problems. Malaysia's environmental issues are diverse, ranging from land degradation due to earthworks and deforestation, to the pollution of water, marine and air due to industrial related activities (Aiken, 1993).

According to the Department of Environment (2013), in recent years, industrial activities continue to become the major contributors towards environmental pollution in Malaysia. At present, main sources of water pollution include manufacturing and agro-based industries which is about 50 percent of the total sources of water pollution. Gaseous emissions from industrial sources as well as motor vehicles continue to increase, with industries being the highest contributor for particulate matter (Mustafa, 2013). In coastal waters, oil and grease contaminations are widespread and increasing, with more restricted but important problems of heavy metals such as copper, mercury and lead levels exceeding proposed standards due to land-based uncontrolled industrial discharges.

It must be pointed out that historically, Malaysian environmental law developed not as "environmental law" but as legislations to promote sound housekeeping practices in specific sectors, in line with the government policies at the time (Rashid, 1981, and Hussain, 1984). Generally, these laws were also largely sectoral in nature focusing on specific activity areas. Thus, during that time, not much thought was given to having a singular environmental law. Environmental enforcement in Malaysia started before independence in 1957 by merely addressing the sectoral environmental problems due to the development of Malaysia's land and natural resources governance under the natural resources related laws. Among the early forms of environment related laws were the Water Enactments 1920; the F.M.S. Forest Enactment in 1934; the Merchant Shipping Ordinance 1952; the Land Conservation Act 1960; the Fisheries Act 1963; and the Factories and Machinery Act 1967. The pollution-related provisions which were scattered through these variety of statutes were administered by diverse government agencies. Offences structured within these statutes were also uncomplicated, with low penalties and little enforcement. Subsequently, with the environmental problems getting more complex, these legislations were found

to be limited in scope and inadequate to deal with these problems (Mustafa, 2009).

The Environmental Quality Act was enacted in 1974 as an attempt to formulate an integrated approach in managing the environment. This Act is an enabling piece of legislation relating to the “prevention, abatement, control of pollution and enhancement, and for the purposes connected therewith”. It seeks to establish a balance between industrialization and the equally important goal of protecting the public health and welfare while preserving the natural resources. There are various strategies, including that of criminal sanction, being applied in dealing with pollution control and other environmental offences as examined below.

Scope of Environmental Crime under the Law

While criminal law has always had a place in the environmental statutes in Malaysia, its strategy is usually performed as a supportive function to the main purpose of the law. For example, under the Environmental Quality Act 1974, main strategies apply to regulate the potentially harmful activities of polluters are through complex licensing and permission schemes as provided in the Environmental Quality (Licensing) Regulations 1977, and sections 11 to 17 of the Act. Thus, the application of criminal law may become problematic when activities complained of may be based on legitimate business practices due to the facts that licensed pollution is lawful, while unlicensed pollution is prohibited. While fines are the predominant penalty for environmental offences, their relatively low sanctions have given rise to the concern about the effectiveness of criminal law in deterring environmental pollution. However, over the years, the Environmental Quality Act 1974 has seen the shift from the command and control system in the 1970s, to reactive system in the 1980s that is more adapted to preventive measures, and in the millennium having the pro-active system to complement the existing ones (Mustafa, 2011). Its enforcement strategies have also been improved by imposing higher penalties, including the possibility of imprisonment for serious environmental offences. In 1996, the Act was extensively amended to provide for stricter punishments for environmental criminal offences to reflect truly the severity of offences committed including to increase the amount of penalty from the maximum of RM 10,000 to RM 100,000 for pollution offences, and RM 500,000 for more serious offences.

It is argued that the increase in the maximum statutory penalty for an environmental offence may result in tougher penalties imposed on the offenders. This is true for Malaysia where decided environmental cases have shown that the courts tend to imposed severer amount of penalties to reflect the seriousness of the offences. One example of a criminal offence

prosecuted under the Environmental Quality Act 1974 is *Malaysian Vermicelli Manufacturers (Melaka) Sdn. Bhd. v. Pendakwa Raya* [2001] 3 AMR 3368. In this case, the Malacca Sessions Court convicted and sentenced the appellant to a fine of RM 75,000 and in default one year's imprisonment, on a charge of discharging effluent into inland waters (Malacca river) contrary to Regulation 8(1)(b) of the Environmental Quality (Sewage and Industrial Effluents) Regulations 1979 (the Regulations) without a license. This is an offence under section 25(1) of the Environmental Quality Act 1974, punishable under section 25(3) of the same Act. This section states that any person who contravenes section 25(1) "shall be guilty of an offence and shall be liable to a fine not exceeding RM100,000 or imprisonment for a period not exceeding five years or both, and to a further fine not exceeding RM1,000 a day for every day that the offence is continued...". The evidence of the chemist established that the effluent discharged from the appellant's factory contained substances having concentrations greater than those specified in the acceptable standards set out in the third schedule to the Regulations. The charge against the appellant alleged that the effluent discharged from the appellant's factory exceeded the concentration limit set by Regulation 8(1)(b), which refers to standard B in the fourth column of the Third Schedule. The evidence of the chemist revealed that except for PH value, the other substances in the samples of effluent discharged from the appellant's factory were in concentrations greater than the parameter limits set by Standard B. The appellant appealed to the High Court. The High Court, after considering the totality of the evidence provided by the prosecutor, agreed that it had been proved beyond reasonable doubt that the factory was in operation and was discharging effluent into the river, that the charge against the appellant was proven beyond reasonable doubt, and dismissed the appeal.

Criminal Liability within Corporate Entities

The Act is very clear about who has the power to prosecute, and whom should be liable in the event of crime and prosecution, and this is further strengthened by court's interpretation of the Act from decided cases, such as that of *Tenggara Gugusan Holidays Sdn. Bhd. v. Public Prosecutor* [2003] 1MLJ 508. Specifically, three types of people may be prosecuted for the offence committed, namely the "owner", "occupier" and "company director". The "occupier" is defined by the Act as "a person in occupation or control of any premises; or in relation to premises where different parts of which are occupied by different persons in occupation or control of each part; or any vehicle, ship or aircraft".

For the purpose of any "premises", an "owner" is defined by section 2 to mean one of the following, namely: "the registered proprietor of the

premises; the lessee of a lease including a sub-lease of the premises; the agent or trustee of any of the owners or if the owner above cannot be traced or has died, his legal personal representative; or the person for the time being receiving the rent of the premises whether on his own account or as agent or trustee or as receiver". The "owner" in relation to any ship means: "the person registered as the owner of the ship; in the absence of registration, the person owning the ship; in the case of a ship owned by any country and operated by a company which in that country is registered as the ship's operator". "Owner" shall also include the country; or the agent or trustee of any of the owners, or where the owner cannot be traced or has died, his legal personal representative. Lastly, "owner" in relation to any vehicle or aircraft, means "the person registered as the owner of the vehicle or aircraft".

In Malaysia, general liabilities of corporate entities are regulated by the Companies Act 1965. However, environmental criminal liability of the corporation is available in various environmental statutes. Thus, another person that may be held liable under the Environmental Quality Act 1974 is the company director and other company officials or their agents as provided by section 43. In 2007, this section was amended to include the "chief executive officer", when his company, firm or society commits such offences. Section 43 states that: "where an offence against this Act or any regulations made thereunder has been committed by a company, firm, society or other body of persons, any person who at the time of the commission of the offence was a director, chief executive officer, manager, or other similar officer or a partner of the company, firm, society or other body of persons or was purporting to act in such capacity, shall be deemed to be guilty of that offence unless he proves that the offence was committed without his consent or connivance and that he had exercised all such diligence as to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances". To avoid conviction under this section, it is necessary to prove that the offence was committed without his consent and that he had exercised all diligence as to prevent the commission of the offence. Where the court is satisfied that the offence had been committed by a servant or agent when acting in the course of his employment, the principal shall also be held liable for such contravention, unless he proves that the offence was committed without his knowledge or consent, or that he had exercised all diligence to prevent the act. In the case of *Pendakwa Raya v. Synenviro Sdn Bhd* [2012] 2MLJ 829, the company directors of Synenviro Sdn. Bhd. which were charged under section 34B of the Act for accepting schedule waste managed to raise a reasonable doubt then they proved that they did not have any knowledge or *mens rea* of the scheduled waste. For this reason, their appeal was allowed.

Criminal Procedure

For criminal offences committed under the Environmental Quality Act 1974, a person suspected of committing such offences may be brought before the court in any of three ways, namely summons by a court; warrant for his arrest; or arrest without warrant for seizable offences. The most common method of bringing a suspect before the court for offences under the Act is through summons. A summons is a document specifying the charges and requiring the person on whom it is served to appear in court to answer the charges. The procedure pertaining to service of notices for offences under the Act is provided in section 39. Sub section (1) of section 39 requires that every notice, order, summons or document required or authorized by this Act, or any regulations made thereunder to be served on any person may be served through the following methods:

- By delivering the same to such person or by delivering the same to some adult member or servant of his family;
- By leaving the same at the usual or last known place of abode or business of such person in a cover addressed to such person; or
- By forwarding the same by registered post in a prepaid cover addressed to such person at his usual or last known place of abode or business.

Under subsection (2) of section 39, a notice, order, summons or document required or authorized by this Act or any regulations made thereunder to be served on the owner or occupier of any premises shall be deemed to be properly addressed if addressed by the description of the “owner” or “occupier” of such premises without further name or description. Section 39 (3) further provides that a notice, order, summons or document required or authorized by this Act or any regulations made thereunder to be served on the owner or occupier of any premises may be served by delivering the same or a true copy thereof to some adult person on the premises or, if there is no such person on the premises to whom the same can with reasonable diligence be delivered, by affixing the notice, order, summons, or document to some conspicuous part of the premises.

It is the duty of the Director General of the Department of Environment to investigate environmental offences as provided by section 3 of the Environmental Quality Act 1974. A criminal prosecution is usually begun by lodging a first information report. Only when the investigations are complete that the case will be sent to the court whereby criminal trial and criminal prosecution will be conducted in accordance with specific criminal procedures. For cases involving marine pollution, the Director General is authorized, under section 49, to delegate his investigation power to other agencies. By virtue of the Environmental Quality (Delegation of Powers on Marine Pollution Control) Order 1993, powers on the investigation of

offences under sections 27 and 29 are delegated to any port officer, any fisheries officer, any officer commanding a vessel of the Royal Malaysian Navy, and any officer of customs commanding a vessel of the Customs and Excise Department. Whereas the Environmental Quality (Delegation of Powers on Marine Pollution Control) Order 1994 extends similar delegation of power to any police officer commanding a vessel, or appointed police officer, or the Royal Malaysia Police.

Since offences under the Act are criminal in nature, investigation would therefore requires the application of other laws such as the Evidence Act 1950, and the Criminal Procedure Code. For the purpose of investigation, section 38A(1) of the Environmental Quality Act 1974 authorizes the Director General to examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined. Section 38A(2) further provides that the person referred to in subsection (1) shall be bound to answer all questions relating to the case put to him by the Director General or any officer duly authorized in writing by him, provided that the person may refuse to answer any question, the answer to which would have a tendency to expose him to a criminal charge, penalty or forfeiture. It is a requirement under section 38A(3) that a person making a statement under this section shall be legally bound to state the truth, whether or not the statement is made wholly or partly in answer to questions. Section 38A(5) provides that a statement made by a person under this section shall, whenever possible, be reduced into writing and signed by the person making it or affixed with his thumb-print, as the case may be, after it has been read to him in the language in which he made it and after he has been given an opportunity to make any corrections he may wish, and where the person examined refuses to sign or affix his thumb-print on the statement, the Director General or any officer duly authorized in writing by him shall endorse thereon under his hand the fact of the refusal and the reason for it, if any, as stated by the person examined.

It is a procedural requirement under section 39 of the Act that the prosecution must show that notice was served and the defendant had notification of the said notice. The manner in which such notice may be served is set out in clause (1) of section 39 which states that every notice, order, summons or document required or authorized by this Act or any regulations made thereunder to be served on any person may be served by delivering the same to such person or by delivering the same to some adult member or servant of his family; by leaving the same at the usual or last known place of abode or business of such person in a cover addressed to such person; or by forwarding the same by registered post in a prepaid cover addressed to such person at his usual or last known place of abode or

business. In the case of *Public Prosecutor v. Cocolin Industries Sdn. Bhd.* [2007] MLJU 499, in relation to the procedural requirement of section 39, the judge was of the view that “... for purpose of criminal prosecution, strict compliance of the mode of service is essential to ensure that the accused is fully aware of what he is required to do. This is a significant concept of natural justice and procedural fairness. If the court, for any reason, takes the view that proper notice had not been served and the accused was not aware of the said notice, even though the prosecution is able to demonstrate that they have complied with the provision of section 39(1), the court is entitled to rule that the prosecution has not established one of the vital ingredients of the offence. This is so because compliance of section 39(1) only raises a rebuttable presumption in law that the notice has been served. A presumption is an inference of fact, drawn from other known or proved facts. It is a rule of law under which the courts are authorized to draw a particular inference from a particular fact, unless and until the truth of such inference is disproved by other evidence...”.

There is a restriction on the power of the Director General to institute an environmental case and normally the order of the public prosecutor is required as provided in section 44 whereby no prosecution shall be instituted for an offence under the Act without the consent in writing of the Public Prosecutor. The Magistrate will then inquire into the matter and will send notice to the other party to appear, and the case will proceed according to the procedure laid down in the Criminal Procedure Code. Prior to the amendment of section 44, issues have been raised in decided cases, such as *Public Prosecutor v. Manager, MBF Buildings Services Sdn Bhd.* [1998] 1 MLJ 690, as to whether there can be any institution of proceedings for an offence under the Environmental Quality Act 1974 in the absence of provision providing for a sanction by the Attorney General. This issue is finally resolved with the amended of section 44 in 1998.

Apart from the Environmental Quality Act 1974, there are several other environmental statutes in Malaysia that provide provisions similar to that of section 44 on the requirement of consent of the Public Prosecutor. In the case of *Pai San & Ors v. Public Prosecutor* [2002] 4 CLJ 547, the appellants were charged at a Magistrate’s Court for fishing in Malaysian waters without an international agreement allowing the same or a valid permit issued under section 19 of the Fisheries Act 1985, thereby committing an offence under section 25(a) of the Act. At the end of the prosecution’s case, the appellants were called upon to enter their defences. The appellants raised a question of law on the validity of the prosecution, which was conducted by an officer of the Fisheries Department. The learned magistrate refused the application, whereupon the appellants filed a notice of motion in the High Court for the orders that the prosecution of a charge under the

Fisheries Act 1985 can only be conducted by the Public Prosecutor and that the prosecution conducted by an officer of the Fisheries Department was void and *ultra vires* the Federal Constitution. The High Court dismissed the appellants' application and the appellants appealed to the Court of Appeal. The court dismissed the appeal on the basis that, in the instant case, although there was no provision in the Fisheries Act 1985 empowering an officer of the Fisheries Department to conduct the prosecution under the Fisheries Act, the Act should be read together with the Exclusive Economic Zone Act 1984. Section 38 of the Exclusive Economic Zone Act 1984 provides that "a prosecution for an offence under this Act or any applicable written law shall not be instituted except by or with the consent of the Public Prosecutor ...". The expression "or any applicable written law" in section 38 was defined in section 2 of the same Act as "any written law provided to be applicable in respect of the exclusive economic zone, continental shelf or both". Since the Fisheries Act 1985 are the "written law" applicable to fisheries in the exclusive economic zone, the words "A prosecution for an offence under this Act or any applicable written law" in section 38 of the Exclusive Economic Zone Act 1984 referred, *inter alia*, to a prosecution for offences under the Fisheries Act 1985. Section 38(1) of the Exclusive Economic Zone Act 1984 provides that a prosecution shall not be instituted except by or with the consent of the Public Prosecutor. It is argued that the powers of the Public Prosecutor are not taken away from him and given to somebody else as he alone who may institute or give consent for a prosecution which is consistent with his powers as provided by Article 145(3) of the Federal Constitution. Therefore, section 38(1) is constitutional and valid and it gives the Public Prosecutor power to give consent to prosecute, and in the instant case he had, in the exercise of that power, given his consent. On the basis of this consent, the officer of the Fisheries Department was clearly authorized to conduct the prosecution of the appellants. Therefore, in this case, such prosecution was valid.

Conclusion

Modern environmental legislation in Malaysia tends to reflect the policy of the government in using criminal sanction as a deterrence measure in criminal related offences. The introduction of longer period of imprisonment and higher amounts as penalties for environmental offences show that severe punishments are intended to result in a reduction of crimes against the environment, as means of protecting the environment. In Malaysia, the Environmental Quality Act 1974, which is the main legislation relating to environmental protection and pollution control, is the law most responsible for the development and application of provisions against environmental crime. Based on earlier findings of this paper, it is concluded

that environmental sanction is a vital component within the whole of legal process relating to environmental crime. Environmental sanctions, which is based on criminal law, are essential in prosecuting polluters, determining preventive measures, and highlighting specific needs. While the main focus of this paper is on environmental crime and sanction, it is to be stressed that appropriate punishment to environmental offences is only one aspect of the process of good environmental protection. This paper concluded that, environmental policy directives, legal process, as well as judicial decisions help contribute towards the shaping of environmental crime and prosecution in Malaysia, and the overall development of environmental law in the country.

References:

- Aiken, Robert. Development and Environment in Peninsular Malaysia. Singapore: Mc.Graw-Hill International, 1982.
- Clifford, M. Environmental Crime: Enforcement, Policy and Social Responsibility. Gaithersburg USA: Aspen Publishing, 1998.
- Department of Environment Malaysia. Environmental Quality Report 2013. Kuala Lumpur: Department of Environment, 2013.
- Hussain, S.M.N. The Law and Environmental Quality. 1 *CLJ*, 1984.
- Mustafa, Maizatun. Environmental Quality Act 1974: Development and Reform. 2 *MLJ*, 2009.
- Mustafa, Maizatun. Environmental Quality Act 1974: A Tool Towards the Implementation and Achievement of Malaysia's Environmental Policy. *IIUM Law Journal*, 19 (1) 2011.
- Mustafa, Maizatun. Environmental Law in Malaysia. The Netherlands: Kluwer Law, 2013.
- Mustafa, Maizatun and Mariani Ariffin. A Review on Environmental Forensics and Environmental Law in the Malaysian Perspective. In A.Z. Aris, From Sources to Solution. Singapore: Springer, 2014.
- Rashid, N.A. The Environmental law in Malaysia: A Survey. In Ichiro Kato, Environmental Law and Policy in the Pacific Basin Area. Japan: University of Tokyo Press, 1981.